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No. 00-393

In the
SUPREME COURT OF THE UNITED STATES

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CONCORD CITIZENS FOR RESPONSIBLE TOWER SITING, *et al.* AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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4 cpp

TABLE OF CONTENTS

Consent to File.....1

Interest of Amici.....1

Summary of Argument.....4

Argument.....5

1. Section 704 unlawfully conscripts state governments. 7

(a) Federal licensing does not supplant local zoning. 8

(b) Where radio frequency radiation is an issue, local zoning choice is nullified or seriously diminished. 10

2. Local zoning authorities consider themselves foreclosed from protecting constituents against perceived threats from radio frequency radiation. 11

3. The Court below improperly ignored First Amendment issues altogether. 19

Conclusion.....20

Appendix.....A1

TABLE OF AUTHORITIES

Cases:

Cellular Tel. Co. v. Zoning Bd. of Adjustment, 197 F.3d 64 (3d Cir. 1999).....10

FERC v. Mississippi, 456 U.S. 742 (1982).....7

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).....7

City of Madison Joint Sch. Dist .No. 8 v. Wis. Employment Relations Comm'n, 429 U.S. 167 (1976).....20

New York v. United States, 505 U.S. 144 (1992)...5, 6, 8, 18

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S 37 (1983).....20

Printz v. United States, 521 U.S. 898 (1997).....6, 8

Town of Amherst v. Omnipoint Communications Enterprises, 173 F.3d 9 (1st Cir. 1999).....10

Other:

Communications Act of 1934, as amended, 47 U.S.C. § 332 (c)(7)(B)(iv)(2000).....4

Telecommunications Act of 1996
Section 704.....4

47 C.F.R. § 1.1307(b), (c).....9

47 C.F.R. § 1.1310 9

47 C.F.R. § 22.163 9

47 C.F.R. § 22.165 9

47 C.F.R. § 24.809(b) 9

Liakouris, Ana G. Johnson, 53 *Archives of Environmental Health*, No. 3 (May/June 1998) 13

Concord Journal, November 20, 1997 11

The Daily Gazette, Friday, August 7, 1998 12

The New Mexican, March 27, 2000, page A-4 17

CONSENT TO FILE

Consent for the filing of this brief in support of Petitioner has been granted by all parties. Pursuant to Rule 37.2(a), their written consents are appended.[1]

INTEREST OF AMICI

Concord Citizens for Responsible Tower Siting ("CCRTS") is an informal association of persons who live in the Town of Concord, Massachusetts. For the past three years, CCRTS members have worked within the Concord Town Meeting, and with the Town Planning Board, on issues related to the zoning of sites for cellular telephone and PCS wireless facilities.

CCRTS is joined in this brief by the groups and individuals listed below. (CCRTS and supporters shortened to "CCRTS Amici")

Communications Workers of America, AFL-CIO ("CWA"), a party in the Second Circuit below, is a national labor union concerned with the health and safety of its workers who install, maintain and repair personal wireless service facilities.

Chico Citizens for Community Justice (C) is an informal association of residents of the named California city who have opposed placement of wireless facilities in or near residential areas by Pacific Bell Wireless and AT&T Wireless.

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[1] Pursuant to Rule 37.6, no counsel for a party authored any part of this brief. Financial contributors other than CCRTS are marked by "(C)" following their names.

Jimmy Cunningham (C) is a resident of Lincoln, Massachusetts concerned about the siting of a 90-foot personal wireless service tower near the home of his parents which mounts a flashing red light because of its location in a helicopter fly-zone.

Duanesburg Citizens Group is an ad hoc association of residents of Duanesburg, New York living near a 250-foot tower erected by Cellular One in late 1996 and asserting severe detriment to their health from the multiple personal wireless service antennas mounted on the tower.

Garfield-Hyde Park Neighbors Alliance (C) has been active in developing a zoning bylaw in Hyde Park, Vermont.

Bonnie S. Hicks is a resident of Mishawaka, Indiana who has been active in opposing placement of wireless service towers in her community. Having spoken against a zoning application by Sprint (dba "Bright PCS"), she has been summoned as an "adverse party" to appear in St. Joseph County Circuit Court in Sprint's challenge to the denial of its application. (Cause Nos. 71C01 0010 CP 01457 and CP 01458)

Josephine Collins Jacob (C) of Deer Isle, Maine supports the work of CCRTS.

Lexington Coalition (C) is an informal association of persons living in and around the Town of Lexington, Massachusetts formed to oppose the installation of antennas on a church steeple adjacent to The Waldorf School.

Marblehead Cancer Prevention Project (C), based in Marblehead, Massachusetts, is an informal association of persons concerned about carcinogens and carcinogenic agents in the human environment. Among other recognition,

the Project received in September, 1998 the Annual Community Service Award of the Marblehead Chamber of Commerce.

Neighborhood Preservation Alliance (C) is an association of Philadelphia residents concerned with the detrimental aesthetic and health effects of personal wireless facilities antennas in the Roxborough/Manayunk areas of the City.

Neighbors Opposing Towers is an informal association of residents of Orlando, Florida and environs which opposed placement of a cellular service monopole antenna in the modified steeple of a suburban church housing a child development center and day care and infant care facilities.

Pacific Palisades Methodist Preschool vs Metricom (C) is an informal association of citizens formed in the California community of Pacific Palisades out of concern for the siting of wireless antennas -- in the bell tower of a church housing the preschool -- by the data and internet access provider, Metricom.

Rural Arizonans for a Microwave Antenna-Free Environment (C), based in Snowflake, supports CCRTS.

Santa Fe Citizens Task Force on Microwave Antennas (C) is an informal association of 800 New Mexico residents who have petitioned against the siting of wireless service towers in residential districts.

Robert P. and Martha M. Bryson and Charles Landon of San Diego, California; Munster Community Watch of Munster, Indiana; and Lou Ann Grabowski of La Grange Highlands, Illinois also support CCRTS. Other groups and

individuals supporting CCRTS are mentioned and quoted in Section 2 of the Argument.

Beyond their personal fears arising from the known and unknown effects of radio frequency radiation ("RFR") on human beings, the CCRTS Amici also are motivated by their frustrations as citizens attempting to work with or to influence the elected and appointed officials of their communities in the siting of cellular telephone and PCS facilities. Because many of these officials refuse to entertain any discussion of RFR, even within the bounds of the federal preemption, the CCRTS Amici join with Petitioner, Citizens for the Appropriate Placement of Telecommunications Facilities ("CAPTF"), in urging the Court to review the constitutionality of Section 332(c)(7)(B)(iv) of the Communications Act of 1934, as amended, 47 U.S.C. § 332(c)(7)(B)(iv) (2000).[2]

SUMMARY OF ARGUMENT

Section 704 of the Telecommunications Act of 1996, by adding subparagraphs 7(B)(ii) and (iv) to Section 332(c) of the Communications Act of 1934, as amended, encroaches impermissibly upon the powers reserved to the states under the Tenth Amendment. While leaving most zoning legislation and adjudication to local authorities, the statute effectively conscripts these authorities by compelling them to grant any wireless siting application if denial would carry the slightest taint of RFR concerns.

As documented by the testimony in this brief, many citizens fear that their health and safety are not adequately

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[2] Reproduced at A29-30 of Petitioner's Brief as Section 704 of the Telecommunications Act of 1996.

protected under the federal radiation standard. Local governments often are confronted with the unpalatable alternatives of denying a wireless facilities application opposed by their constituents or risking litigation from the disappointed applicant. No matter how they choose, these officials cannot escape the brunt of public disapproval for an outcome not in their control. Some municipalities have gone so far as to ban or restrict discussion of the radiation standard altogether. The federal government is essentially insulated from this mounting local unrest.

Petitioners below argued that restrictions on the content of discussion at zoning hearings were violations of the First Amendment rights of citizens to speak freely and to petition for redress of grievances. The Court below brushed aside the First Amendment arguments, despite the close scrutiny demanded of restraints on political speech.

ARGUMENT

In *New York v. United States*, 505 U.S. 144 (1992), this Court held invalid a federal statute requiring states either to adopt regulations controlling the disposal of privately-generated radioactive waste or to assume ownership of the dangerous material. The Court declared, 505 U.S. at 178:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript

state governments as its agents.

Conversely, where a state is able to forgo adoption of its own regulatory program, and to substitute a federal regime validly adopted under the Commerce Clause, there is no unconstitutional encroachment on the powers reserved to it under the Tenth Amendment.

The statute challenged here fails this test of choice. Section 704 is not a federal substitute for local zoning of personal wireless service facilities. Instead, it effectively compels municipal planners and land-use decision-makers, acting "in their official capacities as state officers,"[3] to approve any personal wireless facilities site where the effects of RFR on human health and safety are at issue.

The testimony below of concerned citizens from around the country fulfills, emphatically, this Court's prediction that "where the Federal Government directs the states to regulate, it may be state officials who will bear the brunt of public disapproval." *New York v. United States*, 505 U.S. at 169.

Seeming to fear litigation more than public disapproval, however, some local zoning authorities have deemed it necessary, in light of FCC warnings, to suppress political speech about the environmental effects of RFR. Thus their unlawful conscription as agents of the federal government is compounded by the unlawful infringement of their constituents' freedom to speak and to petition for redress of grievances.

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[3] *Printz v. United States*, 521 U.S. 898, 930 (1997).

1. Section 704 unlawfully conscripts state governments.

As Petitioner CAPTF points out (Pet. Br., 4-7), Congress wanted Section 704 of the Telecommunications Act of 1996 to speed the deployment of personal wireless service facilities without substituting a federal program for local zoning procedures. The legislation thus differed markedly from the Surface Mining and Control Act of 1977 upheld in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). The new law also differed from *FERC v. Mississippi*, 456 U.S. 742 (1982) because the federal limits on local zoning were to be mandatory, not merely suggestive.

In *Hodel*, national controls on surface coal mining, as an exercise of Congressional authority to regulate interstate commerce, did not violate the Tenth Amendment because they (1) were directed at private individuals and not at states, and (2) offered a choice of a state program meeting minimum federal standards or "adoption of a federal program for any state that chooses not to submit a program." 452 U.S. at 288.

Similarly, in *FERC v. Mississippi*, the Public Utility Regulatory Policies Act of 1978 preserved states' choices by requiring them to "consider," but not necessarily to adopt, certain federal recommendations for regulating the retail rates of electricity and natural gas. 456 U.S. at 765.

By contrast, the language of Section 704 is compulsory. A local zoning authority "shall act" on an application to place, construct or modify a personal wireless facility, but must ignore the environmental effects of RFR "to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions."

The Court below disagreed that the effect of this language was to "commandeer local authorities to administer a federal program" contrary to the Tenth Amendment teachings of *New York* and *Printz*:

> State and local governments are not required to approve or prohibit anything. The only onus placed on state and local governments exercising their local power is that they may not regulate personal wireless service facilities that conform to the FCC Guidelines on the basis of environmental effects of RF radiation.

Pet. Br. A-21. The Court's view might be acceptable if the environmental effects of RF radiation were the sole criterion for disposition of the zoning application. Effectively, a federal program would have been substituted for the local process. But that is not what Congress did.

To the contrary, Congress affirmatively left in municipal hands the application of most land-use criteria affecting the siting of radio antennas. As long as local authorities act within general federal limits of fairness, promptness and record evidence, they are expected to rule on such conventional zoning considerations as aesthetics, suitability of a site's use, structural safety of towers, etc. They must decide. There is no federal program to substitute for local or state laws and regulations.

(a) Federal licensing does not supplant local zoning.

As cellular telephone systems have been built out and the industry has matured from its first licensing in the early 1980s, the Federal Communications Commission ("FCC")

has streamlined its regulations to eliminate prior federal approval of minor system modifications or of "internal" transmitters whose addition does not significantly extend the boundaries of the serving area. 47 C.F.R. §§ 22.163 and 22.165 (1998). When broadband PCS emerged in the 1990s, with its higher frequencies transmitting shorter distances and requiring more radio antennas, the FCC provided for blanket licensing in preference to approval of individual sites. 47 C.F.R. § 24.809(b) (1998).[4]

Moreover, the structure of the environmental regulations controlling RFR is to presume – through "categorical exclusions" – that most cellular and PCS facilities comply. The rules rely on carrier-administered "environmental assessment" to remedy non-compliance at the license application stage. 47 C.F.R. §§ 1.1307(b), 1.1310. The only sure recourse for citizens seeking to overcome these presumptions of compliance is to measure for excessive electromagnetic fields or power densities after a transmitter begins operation, and to complain through Section 1.1307(c).[5] Thus, the federal licensing program for personal wireless facilities is nothing like the site-specific review in the local zoning process.

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[4] Sections 22.163 and 24.809 later were consolidated into current Sections 1.913 and 1.929.

[5] The cited RFR rules are reproduced in the Appendix to this brief. At oral argument below, FCC Counsel acknowledged that accurate measurements are only made by expensive and sophisticated equipment beyond the capabilities of most citizens, but that such measurements "would certainly be the best evidence to present to the agencies." (Tr. 37-38).

(b) Where radio frequency radiation is an issue, local zoning choice is nullified or seriously diminished.

One acceptable basis for declining a wireless facilities application is the availability of alternate sites.[6] Another is the conclusion that no "significant gap" in wireless service will be filled by the facility applied for.[7] Local zoning authorities have come to weigh such factors routinely in fulfilling the land-use obligations left with them by Congress under Section 704(a). But these common-sense considerations are off-limits if RFR concerns are present.

Local officials faced with an RFR issue might prefer to find another site – an industrial zone, say, instead of a school or hospital or residential area. They might wish to question whether a minor improvement in wireless phone coverage – often requiring a particular antenna location – is worth the perceived threat of placement near a home for the elderly.

But the language of the statute has proven too intimidating. To turn down an application on the basis of RFR effects, even if only in pursuit of an alternative site, is to risk a lawsuit from the applicant. Such effects may not be the

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[6] *Town of Amherst v. Omnipoint Communications Enterprises,* 173 F. 3d 9 (1st Cir. 1999).

[7] *Cellular Tel. Co. v. Zoning Bd. of Adjustment,* 197 F.3d 64 (3d Cir. 1999).

paramount or prevailing reason for the decision, but if they are perceived as even a small part of the denial, litigation is a likely result.

The FCC has warned that a "local zoning decision that appeared from the record to be based upon concerns over RF emissions" might be preempted under the statute and the agency's rules "even if the local zoning board did not specifically say so in its decision."[8]

Faced with this dilemma, many local planning and zoning boards have simply refused to deny applications where RFR is an issue. Some have gone further and refused to permit citizens to speak on the subject at all. Effectively, these municipal authorities have been conscripted to ignore, and even to silence, the health and safety concerns of their constituents. The unhappy result is illustrated in the following section.

2. Local zoning authorities consider themselves foreclosed from protecting constituents against perceived threats from radio frequency radiation.

CCRTS member Virginia Hines writes that in Massachusetts "our Town Boards feared court action by the providers

> if there were an indication that these [RF] concerns entered into the decision whether or not to permit the construction of such a facility or in the adoption of a zoning

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[8] Procedures for Reviewing Requests for Relief from State and Local Regulations, 12 FCC Rcd 13494, 13549 (1997).

amendment addressing such facilities.[9]

The fear proved well founded. After Ms. Hines spoke of RFR concerns at a Concord Town Meeting, the Town adopted a zoning bylaw making no reference to RFR. Nevertheless, AT&T Wireless sued to overturn the legislation. The case is pending.[10]

In Duanesburg, New York, the Town Planning Board's approval of the addition of 12 Bell Atlantic (now Verizon) wireless antennas to a 250-foot tower owned by another carrier, Cellular One, so enraged John Proper, a member of the Duanesburg Citizens Group, that he was reported to have "stood and screamed, 'If any health problems arise, it's on your head'." State police were called to the scene, but no arrests were made.[11] In a declaration

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[9] Declaration of April 9, 1998. A contemporary newspaper account of a meeting of the Concord Town Planning Board quotes the Board Chairman as saying "there would be no discussion of adverse environmental or health effects" in the Board's consideration of a zoning bylaw amendment on tower siting. *Concord Journal,* November 20, 1997, at 1. The declarations of Ms. Hines and other CCRTS Amici spokespersons are in the form of an unsworn statement "to the best of my information and belief." Sworn testimony is identified as such. CCRTS Amici respectfully ask the Court to accord such weight to this informal and formal evidence as is proper under its rules, and to take judicial notice of documented litigation.

[10] *AT&T Wireless PCS, Inc., d/b/a AT&T Wireless Services v. Town of Concord, Massachusetts, et al.*, No. 99CV-11866RWZ (D. Mass).

[11] Michael DeMasi, Tower anger flares at Duanesburg meeting, *The Daily Gazette*, Friday, August 7, 1998. According to the paper, police had also been called to a Board meeting six months earlier, reportedly responding to a confrontation between Town Supervisor William Park and another Citizens Group member, Lawrence Stankavich.

dated October 6, 2000, Citizens Group members Lawrence Stankavich and his wife, Susan, recount that they have complained since April 1997, before the addition of the Bell Atlantic antennas, of "ill medical health effects" they believe are caused to them and their neighbors by the proximity of the tower's transmitters to their homes. The effects included severe headaches, allergies, asthma, tumors, night sweats, fibromyalgia, severe back pain and chronic nose bleeds.[12] According to the Stankaviches:

> Our Town and Planning Boards continually referred to the Telecommunications Act of 1996 and claimed their hands were tied . . . The Town and Planning Board[s] declared they feared court action by the providers. In fact, they approved a co-location application by Bell Atlantic after a court ruling to return to the Planning Board for further review.

Marybeth Meek of El Cajon, California wrote on October 6, 2000 to describe hair loss and fevers suffered by her daughter and her own migraine disorder, fibromyalgia and sleeplessness which she believes to be caused by antennas mounted on a water tower near her home. According to her letter:

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[12] The appearance and recurrence of symptoms such as these have led researchers to ask whether radiofrequency radiation sickness syndrome is a medical entity. Ana G. Johnson Liakouris, 53 *Archives of Environmental Health*, No. 3 (May/June 1998) The syndrome has achieved a degree of popular currency through the Johns Hopkins Foreign Service Health Status study ("Lilienfeld Study") examining effects of alleged Soviet microwave irradiation of the U.S. Embassy in Moscow, 1953-76.

> The city said it sympathized with us on all our concerns, but none the less would be required to approve the conditional use permit because they could not turn the cellular communications companies down second to the protections they received from the Telecommunications Act of 1996.

Writing on October 5, 2000 for the Garfield/Hyde Park (Vermont) Neighbors Alliance, Dennis Clancy declared that in a public hearing to consider new zoning bylaws, attorneys for interested wireless carriers "threatened that any provisions in the zoning bylaw that ignored the prohibitions set forth in the Telecommunications Act of 1996 would inevitably lead to lawsuits against the Town."

In losing the battle over antennas near The Waldorf School, a School parent, clinical psychologist Dr. George Eastman, concluded in a statement of October 8, 2000 that he and the Lexington Coalition

> felt unreasonably constrained by at least four factors: (1) the power given to the FCC in the 1996 Telecommunications Act to preempt state and local authority in matters of public health, safety and welfare, (2) the intimidating threat of court action by wireless companies such as Nextel against towns and citizens, (3) the degree to which accurate information regarding the health hazards of PCS technology is upstaged by paid industry advocates who misinform the public, (4) the absence of objective, government (not industry) funded research.

The founder of the Marblehead Cancer Prevention Project, Linda Weltner, declares that when the Town Planning Board opposed placement of a Sprint antenna on a high school flag pole, the Board "was threatened with a law suit and complied with its placement only because of that threat." Ms. Weltner continues:

> The head of the Planning Board stated in a public meeting that they feel they are prevented from making health-based decisions about any of these issues because of the preemption of their power by Section 704 of the Telecommunications Act.

In Philadelphia, Pennsylvania, the Director of Construction Codes Compliance for the City's Department of Licenses and Inspections twice during 1999 wrote to a member of the Neighborhood Preservation Alliance, David K. O'Neil, that the Department "has no regulatory powers concerning alleged threats to health or environment from radio frequency emissions" and referred the Alliance to the FCC. According to O'Neil's declaration of October 6, 2000, the local Zoning Board of Adjustment extended the scope of Section 704 by applying it to broadcast tower siting:

> Furthermore, we were prohibited from entering testimony about the adverse health effects on the community in regards to two new 1,000 foot broadcast towers that were approved in June of 2000 by Philadelphia's Zoning Board of Adjustment.

Martha Mellor Bryson of San Diego, California declares in a letter of October 5, 2000 that in her battle "to keep a cellular telephone antenna farm from intruding into my residential neighborhood," she

> continued in fear that at some time during a public presentation I might slip and mention my health concerns. I was informed by the President of the Ocean Beach Planning Board that if I did slip and express my well-founded fears and concerns that my testimony would be struck and might invalidate the entire plea to keep the antennae farm out of my neighborhood.

The Santa Fe Citizens Task Force on Microwave Antennas represents some 800 citizens of Santa Fe, New Mexico who have signed petitions against the placement of wireless transmitters in residential areas. According to a declaration of October 3, 2000 by Task Force members Merida Blanco and Janet Degan:

> However, when we have tried to express our concerns in City hearings during the permitting process, we have been instructed not to speak . . . about any concerns we may have regarding our health or safety. The City Attorney has advised us that if we as citizens voice our concerns in any City hearings, U.S. West and/or other Telecommunications Corporations will claim the right to sue the City of Santa Fe, under the Telecommunications Act of 1996.
>
> * * *
>
> The Telecommunications Act of 1996 has effectively eliminated Local Zoning Boards' ability not only to respond to citizen concerns – but literally to hear them. If the

> Corporations have free reign [sic] to use our residential neighborhoods for their profits, and we cannot legally petition our governments for protection of our health and safety, or for redress of grievances, we are left with no recourse but civil disobedience.[13]

Testimony of this kind also appeared in the record below. An affidavit from Janet Newton of Cabot, Vermont declared that officials in her Town advised her and her husband that

> there could be no discussion in the record on environmental or health concerns for fear of a court challenge by any provider that decisions were even indirectly based on health or environmental concerns.[14]

Since the preparation of Ms. Newton's testimony, one of those Cabot officials, Caleb Pitkin, has submitted a supporting affidavit dated October 7, 2000, and stating, in part:

> Our [Planning] Commission and Selectboard decided that it would not allow discussion or testimony pertaining to health, safety, quality

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[13] A newspaper report of the debate quoted City Attorney Peter Dwyer: "The federal government said, 'We'll have that debate in Washington. You can't have it in Santa Fe'." The report continued: "Dwyer said he sympathizes with the wary neighbors, but the health issue is simply taboo." *The New Mexican*, March 27, 2000, page A-4.

[14] Joint Brief of Petitioners Ad-Hoc Association and Communications Workers of America, May 22, 1998, Exhibit A.

> of life or environmental effects of radio-frequency radiation . . . [because] the courts or the FCC might rule our proposed zoning amendment invalid.

Another local official, Holly Fournier of Charlotte, Vermont, testified on the record below of her frustrating inability to address constituents' health and safety concerns related to RFR.[15]

It is important to note that the Hines (Town of Concord), Clancy (Hyde Park) and Blanco/Degan (City of Santa Fe) declarations and the Pitkin affidavit quoted above relate expressly to legislative functions of their respective governments. Thus they recall the warning in *New York v. United States* that "no Member of the Court has ever suggested that such a [strong] federal interest would enable Congress to command a state government to enact state regulation." 505 U.S. at 178. They also underline the Court's concern that

> where the Federal Government directs the states to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.

505 U.S. at 169.

The citizen testimony above transforms the conditional language of the *New York* opinion into a

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[15] Joint Reply Brief of Petitioners Ad-Hoc and CWA, July 27, 1998, Exhibit A.

declarative description of reality. There should be no doubt that local zoning staff and elected officials are "bear[ing] the brunt of public disapproval" while the FCC effectively is insulated, by the nature and structure of its rules, from examining wireless applications site by site and case by case.

3. The Court below improperly ignored First Amendment issues altogether.

Two petitioners below, Ad-Hoc Association and CWA, argued that

> From the face of the statute, discussion of RFR concerns at public hearings ought to be acceptable for the minimal purpose of evaluating compliance with FCC standards. To the contrary, however, citizens at some meetings have been denied altogether the chance to speak to the topic.

(Joint Brief, May 22, 1998, 68.) The FCC responded that the local officials were only exercising their legitimate authority to control the agendas of public meetings and to exclude irrelevant matter. Beyond that, said the agency, aggrieved citizens could sue for violation of their rights. (FCC Brief, July 14, 1998, 43-44) On reply, petitioners asked the Court to clarify that the preemptive language of Section 704 did not limit discussion for the purpose of eliciting an applicant's compliance with federal RFR standards. They contended that the FCC's warning against any such discussion (note 8, *supra*) amounted to government suppression of protected speech in violation of the First Amendment. (Joint Reply Brief, July 27, 1998, 37-38)

The Court below addressed only the Tenth Amendment claims of Petitioners and brushed aside the First

Amendment challenge simply as "without merit." (Pet. Br., A-21). That was surprising in light of this Court's teachings about content-based restrictions on speech,[16] especially political speech.[17] In light of the declarations and affidavits discussed above, invoking not only freedom of speech but also redress of grievances, the CCRTS Amici ask this Court to review whether a complete ban on RFR debate at public zoning hearings offends the Constitution.

CONCLUSION

For the reasons discussed above, the CCRTS Amici urge the Court to grant the Petition for Certiorari of the Citizens for the Appropriate Placement of Telecommunications Facilities, *et al.*

Respectfully submitted,

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[16] *City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations. Comm'n*, 429 U.S. 167, 176 (1976). ("When the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of . . . the content of their speech.").

[17] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S 37, 45 (1983) (State must show that "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

APPENDIX

TITLE 47--TELECOMMUNICATION CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION PART 1--PRACTICE AND PROCEDURE--Table of Contents Subpart I--Procedures Implementing the National Environmental Policy Act of 1969

Sec. 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

(a) Commission actions with respect to the following types of facilities may significantly affect the environment and thus require the preparation of EAs by the applicant (see Secs. 1.1308 and 1.1311) and may require further Commission environmental processing (see Secs. 1.1314, 1.1315 and 1.1317):

(1) Facilities that are to be located in an officially designated wilderness area.

(2) Facilities that are to be located in an officially designated wildlife preserve.

(3) Facilities that: (i) May affect listed threatened or endangered species or designated critical habitats; or (ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973.

Note: The list of endangered and threatened species is contained in 50 CFR 17.11, 17.22, 222.23(a) and 227.4. The list of designated critical habitats is contained in 50 CFR 17.95, 17.96 and part 226. To ascertain the status of

proposed species and habitats, inquiries may be directed to the Regional Director of the Fish and Wildlife Service, Department of the Interior.

(4) Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places. (See 16 U.S.C. 470w(5); 36 CFR 60 and 800.)

Note: The National Register is updated and re-published in the Federal Register each year in February. To ascertain whether a proposal affects a historical property of national significance, inquiries also may be made to the appropriate State Historic Preservation Officer, see 16 U.S.C. 470a(b); 36 CFR parts 63 and 800.

(5) Facilities that may affect Indian religious sites.

(6) Facilities to be located in a flood Plain (See Executive Order 11988.)

(7) Facilities whose construction will involve significant change in surface features (e.g., wetland fill, deforestation or water diversion). (In the case of wetlands on Federal property, see Executive Order 11990.)

(8) Antenna towers and/or supporting structures that are to be equipped with high intensity white lights which are to be located in residential neighborhoods, as defined by the applicable zoning law.

(b) In addition to the actions listed in paragraph (a) of this section, Commission actions granting construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities, require

the preparation of an Environmental Assessment (EA) if the particular facility, operation or transmitter would cause human exposure to levels of radiofrequency radiation in excess of the limits in Secs. 1.1310 and 2.1093 of this chapter. Applications to the Commission for construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities must contain a statement confirming compliance with the limits unless the facility, operation, or transmitter is categorically excluded, as discussed below. Technical information showing the basis for this statement must be submitted to the Commission upon request.

(1) The appropriate exposure limits in Secs. 1.1310 and 2.1093 of this chapter are generally applicable to all facilities, operations and transmitters regulated [[Page 284]] by the Commission. However, a determination of compliance with the exposure limits in Sec. 1.1310 or Sec. 2.1093 of this chapter (routine environmental evaluation), and preparation of an EA if the limits are exceeded, is necessary only for facilities, operations and transmitters that fall into the categories listed in table 1, or those specified in paragraph (b)(2) of this section. All other facilities, operations and transmitters are categorically excluded from making such studies or preparing an EA, except as indicated in paragraphs (c) and (d) of this section. For purposes of table 1, building-mounted antennas means antennas mounted in or on a building structure that is occupied as a workplace or residence. The term power in column 2 of table 1 refers to total operating power of the transmitting operation in question in terms of effective radiated power (ERP), equivalent isotropically radiated power (EIRP), or peak envelope power (PEP), as defined in Sec. 2.1 of this chapter. For the case of the Cellular Radiotelephone Service, subpart H of part 22 of this chapter; the Personal Communications Service, part 24 of

this chapter and the Specialized Mobile Radio Service, part 90 of this chapter, the phrase total power of all channels in column 2 of table 1 means the sum of the ERP or EIRP of all co- located simultaneously operating transmitters owned and operated by a single licensee. When applying the criteria of table 1, radiation in all directions should be considered. For the case of transmitting facilities using sectorized transmitting antennas, applicants and licensees should apply the criteria to all transmitting channels in a given sector, noting that for a highly directional antenna there is relatively little contribution to ERP or EIRP summation for other directions.

Table 1--Transmitters, Facilities and Operations Subject to Routine Environmental Evaluation

Service (title 47 CFR rule part)	Evaluation required if
Experimental Radio Services (part 5). Multipoint Distribution Service (subpart K of part 21).	Power > 100 W ERP (164 W EIRP) Non-building-mounted antennas: height above ground level to lowest point of antenna 10 m and power > 1640 W EIRP Building-mounted antennas: power > 1640 W EIRP MDS licensees are required to attach a label to subscriber transceiver or transverter antennas that: (1) provides adequate notice regarding potential radiofrequency safety hazards, e.g., information regarding the safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable

	FCC- adopted limits for radiofrequency exposure specified in Sec. 1.1310.
Paging and Radiotelephone Service (subpart E of part 22).	Non-building-mounted antennas: height above ground level to lowest point of antenna 10 m and power > 1000 W ERP (1640 W EIRP) Building-mounted antennas: power > 1000 W ERP (1640 W EIRP)
Cellular Radiotelephone Service (subpart H of part 22).	Non-building-mounted antennas: height above ground level to lowest point of antenna 10 m and total power of all channels > 1000 W ERP (1640 W EIRP) Building-mounted antennas: total power of all channels > 1000 W ERP (1640 W EIRP)
Personal Communications Services): (part 24).	(1) Narrowband PCS (subpart Dnon-building-mounted antennas: height above ground level to lowest point of antenna 10 m and total power of all channels > 1000 W ERP (1640 W EIRP) Building-mounted antennas: total power of all channels > 1000 W ERP (1640 W EIRP) (2) Broadband PCS (subpart E): non-building-mounted antennas: height above ground level to lowest point of antenna 10 m and total power of all channels > 2000 W ERP (3280 W EIRP) Building-mounted antennas: total power of

	all channels > 2000 W ERP (3280 W EIRP)
Satellite Communications (part 25).....	All included.
General Wireless Communications Service (part 26).	Total power of all channels > 1640 W EIRP
Wireless Communications Service (part 27).	Total power of all channels > 1640 W EIRP
Radio Broadcast Services (part 73)...	All included

[[Page 285]]

Table 1 – Transmitters, Facilities and Operations Subject To Routine Environmental Evaluation - Continued

Service (title 47 CFR rule part)	Evaluation required if
Experimental, auxiliary, and special broadcast and other program distributional services (part 74).	Subparts A, G, L: power > 100 W ERP Subpart I: non-building-mounted antennas: height above ground level to lowest point of antenna 10 m and power > 1640 W EIRP Building-mounted antennas: power > 1640 W EIRP ITFS licensees are required to attach a label to subscriber transceiver or transverter antennas that: (1) provides adequate notice regarding potential radiofrequency safety hazards, e.g., information regarding the

	safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable FCC-adopted limits for radiofrequency exposure specified in Sec. 1.1310.
Stations in the Maritime Services (part 80).	Ship earth stations only
Private Land Mobile Radio Services Paging Operations (part 90).	Non-building-mounted antennas: height above ground level to lowest point of antenna 10 m and power > 1000 W ERP (1640 W EIRP) Building-mounted antennas: power > 1000 W ERP (1640 W EIRP)
Private Land Mobile Radio Services Specialized Mobile Radio (part 90).	Non-building-mounted antennas: height above ground level to lowest point of antenna 10 m and total power of all channels > 1000 W ERP (1640 W EIRP) Building-mounted antennas: Total power of all channels > 1000 W ERP (1640 W EIRP)
Amateur Radio Service (part 97).....	Transmitter output power > levels specified in Sec. 97.13(c)(1) of this chapter
Local Multipoint Distribution Service: (subpart L of part 101).	Non-building-mounted antennasheight above ground level to lowest point of antenna 10 m and power > 1640 W EIRP Building-mounted antennas: power > 1640 W EIRP LMDS licensees are required to attach a label to subscriber transceiver antennas that: (1) provides

adequate notice regarding potential radiofrequency safety hazards, e.g., information regarding the safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable FCC- adopted limits for radiofrequency exposure specified in Sec. 1.1310 of this chapter

(2) Mobile and portable transmitting devices that operate in the Cellular Radiotelephone Service, the Personal Communications Services (PCS), the Satellite Communications Services, the General Wireless Communications Service, the Wireless Communications Service, the Maritime Services (ship earth stations only) and the Specialized Mobile Radio Service authorized under subpart H of parts 22, 24, 25, 26, 27, 80, and 90 of this chapter are subject to routine environmental evaluation for RF exposure prior to equipment authorization or use, as specified in Secs. 2.1091 and 2.1093 of this chapter. Unlicensed PCS, unlicensed NII and millimeter wave devices are also subject to routine environmental evaluation for RF exposure prior to equipment authorization or use, as specified in Secs. 15.253(f), 15.255(g), and 15.319(i) and 15.407(f) of this chapter. All other mobile, portable, and unlicensed transmitting devices are categorically excluded from routine environmental evaluation for RF exposure under Secs. 2.1091 and 2.1093 of this chapter except as specified in paragraphs (c) and (d) of this section.

(3) In general, when the guidelines specified in Sec. 1.1310 are exceeded in an accessible area due to the emissions from multiple fixed transmitters, actions necessary to bring the area into compliance are the shared

responsibility of all licensees whose transmitters produce, at the area in question, power density levels that exceed 5% of the power density exposure limit applicable to their particular transmitter or field strength levels that, when squared, exceed 5% of the square of the electric or magnetic field strength limit applicable to their particular transmitter. Owners of transmitter sites are expected to allow applicants and licensees to take reasonable steps to comply with the requirements contained in Sec. 1.1307(b) and, where feasible, should encourage co-location of transmitters and common solutions for controlling access to areas where the RF exposure limits contained in Sec. 1.1310 might be exceeded. [[Page 286]]

(i) Applicants for proposed (not otherwise excluded) transmitters, facilities or modifications that would cause non-compliance with the limits specified in Sec. 1.1310 at an accessible area previously in compliance must submit an EA if emissions from the applicant's transmitter or facility would result, at the area in question, in a power density that exceeds 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility.

(ii) Renewal applicants whose (not otherwise excluded) transmitters or facilities contribute to the field strength or power density at an accessible area not in compliance with the limits specified in Sec. 1.1310 must submit an EA if emissions from the applicant's transmitter or facility results, at the area in question, in a power density that exceeds 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter of facility.

(4) Transition Provisions. Applications filed with the Commission prior to October 15, 1997 (or January 1, 1998, for the Amateur Radio Service only), for construction permits, licenses to transmit or renewals thereof, modifications in existing facilities or other authorizations or renewals thereof require the preparation of an Environmental Assessment if the particular facility, operation or transmitter would cause human exposure to levels of radiofrequency radiation that are in excess of the requirements contained in paragraphs (b)(4)(i) through (b)(4)(iii) of this section. In accordance with Sec. 1.1312, if no new application or Commission action is required for a licensee to construct a new facility or physically modify an existing facility, e.g., geographic area licensees, and construction begins on or after October 15, 1997, the licensee will be required to prepare an Environmental Assessment if construction or modification of the facility would not comply with the provisions of paragraph (b)(1) of this section. These transition provisions do not apply to applications for equipment authorization or use for mobile, portable and unlicensed devices as specified in paragraph (b)(2) of this section.

(i) For facilities and operations licensed or authorized under parts 5, 21 (subpart K), 25, 73, 74 (subparts A, G, I, and L), and 80 of this chapter, the ``Radio Frequency Protection Guides" recommended in ``American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz", (ANSI C95.1-1982), issued by the American National Standards Institute (ANSI) and copyright 1982 by the Institute of Electrical and Electronics Engineers, Inc., New York, New York shall apply. With respect to subpart K of part 21 and subpart I of part 74 of this chapter, these requirements apply only to multipoint distribution service and instructional television fixed service stations transmitting with an equivalent

isotropically radiated power (EIRP) in excess of 200 watts. With respect to subpart L of part 74 of this chapter, these requirements apply only to FM booster and translator stations transmitting with an effective radiated power (ERP) in excess of 100 watts. With respect to part 80 of this chapter, these requirements apply only to ship earth stations.

(ii) For facilities and operations licensed or authorized under part 24 of this chapter, licensees and manufacturers are required to ensure that their facilities and equipment comply with IEEE C95.1-1991 (ANSI/ IEEE C95.1-1992), ``Safety Levels With Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz." Measurement methods are specified in IEEE C95.3-1991, ``Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields--RF and Microwave." Copies of these standards are available from IEEE Standards Board, 445 Hoes Lane, P.O. Box 1331, Piscataway, NJ 08855-1331. Telephone: 1-800-678-4333. The limits for both ``controlled" and ``uncontrolled" environments, as defined by IEEE C95.1-1991, will apply to all PCS [[Page 287]] base and mobile stations, as appropriate.

(iii) Applications for all other types of facilities and operations are categorically excluded from routine RF radiation evaluation except as provided in paragraphs (c) and (d) of this section.

(5) Existing transmitting facilities, devices and operations: All existing transmitting facilities, operations and devices regulated by the Commission must be in compliance with the requirements of paragraphs (b)(1) through (b)(3) of this section by September 1, 2000, or, if not in compliance, file an Environmental Assessment as specified in Sec. 1.1311.

(c) If an interested person alleges that a particular action, otherwise categorically excluded, will have a

significant environmental effect, the person shall submit to the Bureau responsible for processing that action a written petition setting forth in detail the reasons justifying or circumstances necessitating environmental consideration in the decision-making process. (See Sec. 1.1313). The Bureau shall review the petition and consider the environmental concerns that have been raised. If the Bureau determines that the action may have a significant environmental impact, the Bureau will require the applicant to prepare an EA (see Secs. 1.1308 and 1.1311), which will serve as the basis for the determination to proceed with or terminate environmental processing.

(d) If the Bureau responsible for processing a particular action, otherwise categorically excluded, determines that the proposal may have a significant environmental impact, the Bureau, on its own motion, shall require the applicant to submit an EA. The Bureau will review and consider the EA as in paragraph (c) of this section.

(e) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the regulations contained in this chapter concerning the environmental effects of such emissions. For purposes of this paragraph:

(1) The term personal wireless service means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(2) The term personal wireless service facilities means facilities for the provision of personal wireless services;

(3) The term unlicensed wireless services means the offering of telecommunications services using duly authorized devices which do not require individual licenses,

but does not mean the provision of direct- to-home satellite services; and

(4) The term direct-to-home satellite services means the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite.

[51 FR 15000, Apr. 22, 1986, as amended at 52 FR 13241, Apr. 22, 1987; 53 FR 28224, July 27, 1988; 53 FR 28393, July 28, 1988; 54 FR 30548, July 21, 1989; 55 FR 2381, Jan. 24, 1990; 55 FR 50692, Dec. 10, 1990; 61 FR 41014, Aug. 7, 1996; 62 FR 3240, Jan. 22, 1997; 62 FR 4655, Jan. 31, 1997; 62 FR 9654, Mar. 3, 1997; 62 FR 23162, Apr. 29, 1997; 62 FR 47965, Sept. 12, 1997; 62 FR 61448, Nov. 18, 1997; 63 FR 65099, Nov. 25, 1998]

Effective Date Note: At 63 FR 65099, Nov. 25, 1998, Sec. 1.1307, Table 1, was amended. This section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

* * *

Sec. 1.1310 Radiofrequency radiation exposure limits.

The criteria listed in table 1 shall be used to evaluate the environmental impact of human exposure to radiofrequency (RF) radiation as specified in Sec. 1.1307(b), except in the case of portable devices which shall be evaluated according to the provisions of Sec. 2.1093 of this chapter. Further information on evaluating compliance with these limits can be found in the FCC's OST/OET Bulletin Number 65, ``Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation."

Note to Introductory Paragraph: These limits are generally based on recommended exposure guidelines published by the National Council on Radiation Protection and Measurements (NCRP) in ``Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields," NCRP Report No. 86, Sections 17.4.1, 17.4.1.1, 17.4.2 and 17.4.3. Copyright NCRP, 1986, Bethesda, Maryland 20814. In the frequency range from 100 MHz to 1500 MHz, exposure limits for field strength and power density are also generally based on guidelines recommended by the American National Standards Institute (ANSI) in Section 4.1 of ``IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz," ANSI/IEEE C95.1-1992, Copyright 1992 by the Institute of Electrical and Electronics Engineers, Inc., New York, New York 10017.

Table 1--Limits for Maximum Permissible Exposure (MPE)

Frequency range (MHz)	Electric field strength (V/m)	Magnetic field strength (A/m)	Power density (mW/cm \2\)	Averaging time (minutes)
(A) Limits for Occupational/Controlled Exposures				
0.3-3.0.	614	1.63	*(100)	6
3.0-30	1842/f	4.89/f	*(900/f)	6
30-300	61.4	0.163	1.0	6
300-1500	--	--	f/300	6
1500-100,000	--	--	5	6

(B) Limits for General Population/Uncontrolled Exposure

0.3-1.34	614	1.63	*(100)	30
1.34-30	824/f	2.19/f	*(180/f)	30
30-300	27.5	0.073	0.2	30
300-1500	--	--	f/1500	30
1500-100,000	--	--	1.0	30

f = frequency in MHz
* = Plane-wave equivalent power density
Note 1 to Table 1: Occupational/controlled limits apply in situations in which persons are exposed as a consequence of their employment provided those persons are fully aware of the potential for exposure and can exercise control over their exposure. Limits for occupational/controlled exposure also apply in situations when an individual is transient through a location where occupational/controlled limits apply provided he or she is made aware of the potential for exposure.

Note 2 to Table 1: General population/uncontrolled exposures apply in situations in which the general public may be exposed, or in which persons that are exposed as a consequence of their employment may not be fully aware of the potential for exposure or can not exercise control over their exposure.